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No. 84-2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

GARLOCK INC,
Petitioner

v.

W. L. GORE & ASSOCIATES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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ARGUMENT

I. Three Additional Recent Cases Also Present The Same Question And Confirm The Existence Of A Pattern Of Disregard Of Rule 52(a) In The Federal Circuit

In its Petition for Certiorari, Garlock Inc ("Garlock") noted that "[t]here are at least five recent Federal Circuit cases in addition to the present case in which certiorari has been or is being sought on questions substantially the same as those presented here." Pet. for Cert. at 7, n. 3. Each of those cases involves improper *de novo* factfinding by the Federal Circuit.[1]

After the Petition was filed, two additional petitions for certiorari came to Garlock's attention. In No. 84-294, *Envirotech Corp. v. Amstar Corp.*, the questions presented on certiorari are:

> "1. Whether the newly-established Court of Appeals for the Federal Circuit is bound by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) in reviewing a District Court's findings of fact, arrived at after lengthy trial, or whether the Court of Appeals may instead substitute its own factual determinations on contested factual issues for those of the District Court.
> "2. Whether the Court of Appeals, after reversing the District Court for an improper application of the law, may make its own factual determinations *de novo*, contrary to findings of fact by the District Court that were not implicated by the error of law."

Yet again in No. 83-2128, *Raytheon Co. v. Roper Corp.*, one of the questions presented is:

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1. The issue is starkly presented. For example in No. 84-1, *Rohm and Haas Co. v. Crystal Chemical Co.*, the respondent relies on the Federal Circuit's "inherent expertise" in patent matters to justify the Court's approach to appellate review of district courts' factfinding.

> "May the Court of Appeals for the Federal Circuit set aside the Trial Court's findings as to the nature and operation of the patented invention without regard to the 'clearly erroneous' standard of F. R. Civ. P. 52(a) where the findings were supported by the overwhelming weight of both the testimonial and documentary evidence."

We are advised in addition that certiorari will shortly be sought on the same issue in *Simmons Fastener Corp. v. Illinois Tool Works, Inc.*, ____ F.2d ____, No. 83-1084 (C.A. Fed., July 31, 1984).

Thus, there are now at least *nine* cases including the present one[2] in the past few months that present exactly the same abuse.

II. Respondent's Representations That The Court Of Appeals' Decision Was Based Solely On Legal Rulings Are Demonstrably False

Respondent does not deny that there is a pattern of disregard of Rule 52(a) in the Federal Circuit's review of patent decisions of the district courts. Nor does respondent dispute that the Court of Appeals for the Federal Circuit has been frequently criticized on that score, even from within that court. See, *e.g.*, Brief in Opposition, at 23. Instead, respondent's opposition to certiorari appears to rest on an argument that this particular case does not present an example of that pattern. Respondent contends that the Court of Appeals reversed because the district court made "legally erroneous rulings" and on the basis of "undisputed" evidence. *Id.*, at 4, 5, 8, 10, 13, 14, 15, 16, 17, 19, 20, 22. That assertion is clearly false.

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2. That counts only cases in which certiorari has actually been (or is actually being) sought. It does not include the cases in which the same error has been committed but certiorari has not been sought. *See, e.g., Lindemann v. American Hoist and Derrick Co.*, ____ F.2d ____, No. 83-1178 (C.A. Fed., March 21, 1984); *Jones v. Hardy*, 727 F.2d 1524 (C.A. Fed. 1984).

In fact, the Court of Appeals relied — expressly and materially — on its own reassessment of credibility of witnesses. In every instance where the Court of Appeals relied upon supposedly "uncontradicted" evidence as a basis for reversing the District Court, the evidence in question consisted of trial testimony that had been *discredited* by the District Court. That is especially striking with respect to respondent's most important witness, Dr. Sperati, who contradicted himself on the stand and whose testimony the District Court found incredible. *See, e.g.*, A-87 and 88. The Court of Appeals relied heavily on Dr. Sperati's testimony. A-25 to 26. The decision of the Court of Appeals to credit that discredited witness was an essential and inseparable part of its reasoning in reversing the District Court. That approach conflicts directly with that of every other Court of Appeals. *See, e.g., Standard Oil Co. (Indiana) v. Montedison S.p.A.*, 664 F.2d 356, 362 (CA3 1981), *cert. denied*, 456 U.S. 915 (1982) (where trial court hears expert testimony in a patent case and observes the experts' demeanor, Rule 52(a) must be strictly applied).

Respondent lays heavy stress on the assertion that there was a "legal error" in that the District Court supposedly found anticipation "not in *single* patent, but in the combination of two patents." Brief in Opposition, at 7. In fact, however, the District Court found respondent's patents to be anticipated by *each* of the two patents in question, a patent to Smith and a patent to Sumitomo (see A-69 and A-77), and the Court of Appeals redetermined the highly factual issue of anticipation. Respondent is able to assert "legal error" only by asserting that the District Court held something that it manifestly did not hold.

It is illuminating that even though none of the District Court's findings were held clearly erroneous, respondent devotes much of its brief to attacks upon the District Court's factfinding. It is exactly that sort of argument that is supposed to be foreclosed by Rule 52(a) and the related policies. For example, Gore argues that each of various mathematical formulae relied on by the District Court "was prom-

ulgated *after* May 21, 1970 [the date when the patent applications were filed]." Brief in Opposition, at 9. In fact, the District Court *found as a fact* that one of the mathematical formulae for computing stretch rate was consistent with the definition of stretch rate used "*before* the applications upon which the [Gore] patents issued, were filed." A-86 [emphasis supplied].

CONCLUSION

The Court of Appeals second-guessed the District Court's determinations of highly factual issues. In this Court, respondent asserts that the Court of Appeals' decision simply corrected "legal errors." The Court of Appeals decision itself shows, however, that the second-guessing of witness credibility and other reweighing of the evidence were essential parts of the Court of Appeals' reasoning. This case presents a plethora of different types of second-guessing of the "careful" findings of a seasoned United States District Judge. The case presents an excellent opportunity for this Court to enunciate the proper scope of the Federal Circuit's appellate review. The Petition for Certiorari should be granted.

Respectfully submitted,

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